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IN THE

Supreme Court of the United States

October Term, 1974

No. 73-1742

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Petitioners*

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL., *Respondent*

BRIEF AMICUS CURIAE

OF

EXXON CORPORATION
SHELL OIL COMPANY
CELANESE CORPORATION
MOBIL CHEMICAL CO.
UNION OIL COMPANY OF CALIFORNIA
AMERICAN PETROFINA COMPANY
GULF OIL CORPORATION
PHILLIPS PETROLEUM CO.
ATLANTIC RICHFIELD CO.
CHAMPLIN PETROLEUM CO.
ALUMINUM COMPANY OF AMERICA
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INTEREST OF AMICUS CURIAE

The above-named companies, Exxon et al., have obtained variances from the regulations incorporated in the implementation plan for the State of Texas. Some also have variances from other State implementation plans.

10 of the 12 companies have already been given a notice under the citizen suit provision of the Clean Air Act, 42 U.S.C. § 1857h-2, that they will be sued on the basis that the variances granted to them by the Texas Air Control Board are invalid under the Fifth Circuit's decision in *Natural Resources Defense Council, Inc. v. Environmental Protection Agency,* 489 F.2d 390 (1974), and that as a consequence their emissions into the atmosphere are unlawful. A copy of this citizen suit notice is found in Appendix A. Thus, this brief, which is being filed with the consent of both parties, will present the views of companies which are *directly* affected by the outcome of this case.

SUMMARY OF ARGUMENT

Consistent with the provisions of the Clean Air Act,[1] the Environmental Protection Agency (EPA) has established and applied regulations which permit the States to grant variances from their implementation plans for attaining the national ambient air quality standards where the attainment of the ambient standards by the mandatory statutory deadlines will not be affected. Such variances from the emission source standards incorporated in the implementation plans are regarded as "revisions" of the States' implementation plans under 42 U.S.C. § 1857c-5 (a)(3). The EPA's interpretation of the Act as reflected in its regulations permits the States to maintain their "primary role" in developing implementation plans by giving the States sufficient flexibility to develop control strategies which will achieve the national ambient air quality standards "as expeditiously as practicable" as required by the Act. 42 U.S.C. § 1857c-5(a)(2)(A)(i). If variances can-

1. 77 Stat. 392, as added and amended by the Clean Air Amendments of 1970, 84 Stat. 1676, 42 U.S.C. §§ 1857 *et seq.*

not be granted and § 1857c-5(f) postponements are regarded as the sole deferral mechanism for attaining emission source standards, as has been held by the Fifth Circuit, there will be very little improvement in the ambient air quality until the latest possible time under the Act for attaining the ambient standards as the States will be forced to devise plans to overcome the limited relief available under § 1857c-5(f). Thus, the ambient standards will not be attained "as expeditiously as practicable."

Moreover, the EPA's interpretation of the Act should be upheld in view of the substantial reliance on this interpretation by the States and industry resulting in the granting of thousands of variances. If it is found that these variances are invalid, then many companies may have all or part of their facilities shutdown as a result of citizen suits or other enforcement actions, affecting not only the companies and their employees but also the economy and the energy situation. It is further submitted that Respondent, Natural Resources Defense Council, Inc. (NRDC), is estopped to challenge the EPA's interpretation of the Act under the doctrine of laches in view of the delay in challenging the EPA regulations before substantial reliance thereon by the States and industry.

ARGUMENT

I.

The Adverse Impact of The Fifth Circuit's Decision On The States' Role in Air Pollution Abatement and On The Attainment of The Ambient Air Quality Standards

A. Role of The States Under The Clean Air Act

The 1970 amendments to the Clean Air Act maintained state participation in air pollution prevention and control

and, in fact, mandated that the EPA cooperate with local authorities, stating that the "primary responsibility" for assuring air quality still remained with State and local governments.[2] While Federal funding and guidance were provided,[3] the Congress, realizing that air pollution was a diverse and complex problem, left it to the States to develop implementation plans, subject to EPA approval, that would result in the attainment and maintenance of the national ambient air quality standards.[4]

Section 1857c-5(a) sets forth the minimum requirements for plans developed by the States. The implementation plans must provide for the attainment of primary ambient air quality standards "as expeditiously as practicable" but in no case later than three years from the date of the approval of the plan.[5] Also to be included are "emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard. . . ."[6]

B. EPA Guidelines for Implementation Plans

Besides the general statutory provisions for State implementation plans, the EPA has established additional guidelines for the States in their "Preparation, Adoption, and Submittal of Implementation Plans."[7] Through these guidelines the EPA adopted a policy consistent with the statutory provisions of the Clean Air Act which allows the

2. See 42 U.S.C. §§ 1857, 1857a and 1857c-2.
3. See, such as, 42 U.S.C. §§ 1857b, 1857b-1, 1857c and 1857c-3.
4. 42 U.S.C. § 1857c-5.
5. 42 U.S.C. § 1857c-5(a)(2)(A)(i).
6. 42 U.S.C. § 1857c-5(a)(2)(B).
7. See 36 Fed. Reg. 15486 *et seq.*, August 14, 1971, as codified at 40 C.F.R. Part 51 (1973).

States to maintain their primary role in developing implementation plans for meeting the ambient air quality standards.

With respect to the one-year postponement provision, 42 U.S.C. § 1857c-5(f), the Administrator provided in his implementation plan guidelines at 40 C.F.R. § 51.32 (f):

> "A State's determination to defer the applicability of any portion(s) of the control strategy with respect to such source(s) will not necessitate a request for postponement under this section unless such deferral will prevent attainment or maintenance of a national standard within the time specified in such plan: *Provided, however,* That any such determination will be deemed a revision of an applicable plan under § 51.6."

In other words, the requirements of § 1857c-5(f) were to apply only when the deferral of any portion of control strategy regulations would affect the attainment or maintenance of the national ambient air quality standards. Deferrals in other situations only required a revision of the implementation plan by the States in accordance with the less stringent requirements of 40 C.F.R. § 51.6 (1973).[8] Thus, the EPA regulation, 40 C.F.R. § 51.32 (f), provides the States with flexibility in determining how to achieve the ambient air quality standards "as expeditiously as practicable." As will be illustrated below

8. Although revision requirements are not as stringent as those under § 1857c-5(f), public hearings are nevertheless required for all implementation plan revisions under 40 C.F.R. § 51.6(f) (1973), and the Administrator must review a revision in the same manner as he would the initial implementation plan. See 40 C.F.R. § 51.8 (1973). Although only § 1857c-5(f) specifically requires adjudicatory hearings, the variance hearings conducted by the Texas Air Control Board pursuant to 40 C.F.R. § 51.6(f) requirements were in fact adjudicatory.

this is not the case if the decision of the Fifth Circuit is upheld and § 1857c-5(f) postponements are held to be the exclusive deferral mechanism during the pre-attainment period.[9]

C. Impact of Granting Deferrals Only Under 42 U.S.C. § 1857c-5(f)

Pursuant to EPA's implementation plan regulations at 40 C.F.R. Part 51, the majority of the States within the Fifth Circuit adopted a control strategy which would result in the attainment of the ambient air quality standards as soon as practicable. Georgia, Alabama, Mississippi and Louisiana made their emission source regulations immediately effective, while Texas generally made its regulations effective on Decembr 31, 1973, essentially midway during the three-year time period for meeting the primary ambient air quality standards.[10] Under this type of control strategy, variances from emission source regulations are to be granted to only those sources which are able to demonstrate in public hearings the necessity for deferring the applicability of a regulation. Sources which make such a showing are put on attainable but expeditious compliance schedules which are monitored by the State air pollution control agencies. This procedure enables the State agencies to bring each emission source under their immediate

9. "Pre-attainment period" refers to the period prior to the statutory mandatory deadlines for attaining the national primary ambient air quality standards. This brief does not address the issues of post-attainment variances or source hardship considerations, which were decided by the Fifth Circuit, as the EPA's Petition for Certiorari was limited to the pre-attainment variance issue. None of the companies supporting this brief have variances extending into the post-attainment period.

10. See page 6 of EPA's Petition for a Writ of Certiorari. Only Florida made its emission source regulations effective at the latest possible time, generally mid-1975.

scrutiny and to compel each source to achieve compliance with the emission standards as soon as possible, thus resulting in the attainment of the ambient air quality standards "as expeditiously as practicable."

On the other hand, the position of the NRDC as adopted by the Fifth Circuit, if initially adopted by the EPA, would have restricted the States in the development of their implementation plans. If the States were limited in deferring the applicability of emission source regulations to the restrictive postponement requirements of § 1857c-5(f), the States undoubtedly would have established compliance dates at the latest possible time, generally mid-1975, so as to preclude the possibility of forcing the shutdown of numerous sources which, notwithstanding reasonable efforts and availability of technology, would not be able to meet the requirements of §1857c-5(f) due to causes beyond their control.[11] Moreover, the one-year postponement limitation of § 1857c-5(f)[12] is a further reason why the States would have probably imposed compliance dates at or near the latest possible time.[13]

11. To obtain postponements, sources must meet four stringent statutory requirements. One very difficult requirement for some companies is that continued operation must be demonstrated to be "essential to national security or to the public health or welfare." 42 U.S.C. § 1857c-5(f)(1)(D) For a liberal interpretation of this requirement, see *Note*, 52 Tex.L.Rev. 1217, 1224 (1974). In situations where there is a shortage of pollution abatement equipment or material, such as steel floating roofs for storage tanks, the lack of available technology requirement also could not be met. The same would hold true where force majeure situations occur, i.e., strikes, storms, fires, etc.

12. There is no language in § 1857c-5(f) indicating that multiple one-year postponements may be granted. Therefore, it is assumed, but not conceded, that the maximum postponement is one year.

13. For those sources having variances until mid-1975, as do many of the companies supporting this brief, a § 1857c-5(f) one-year post-

Besides restricting the States' flexibility in developing control strategies, the NRDC's interpretation of the Act would also be contrary to the intent of Congress in expeditiously reducing the level of pollutants in the ambient air. If Georgia, Alabama, Mississippi, Louisiana and Texas were forced to alter emission source compliance dates to minimize the number of sources which would have to be shutdown, sources which could easily comply with the emission source regulations in a relatively short time could delay installation of control equipment without violating the State regulations. Thus, the ambient air quality would be improved only at or near the latest possible time for meeting the standards rather than "as expeditiously as practicable", as required by the Clean Air Act.[14]

The advantages of allowing variances from emission source regulations have been recognized by the First Circuit whose opinion has been endorsed by the Eighth and Second Circuits:[15]

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ponement would not provide effective relief with respect to any regulation requiring compliance at a date within two years from the date of approval of the plan. Moreover, a regulation with a compliance date before the last possible time would preclude a source from obtaining a year extension beyond the mid-1975 date for attaining the ambient air quality standards.

14. In view of Congress' use of the word "practicable," the Clean Air Act should not be interpreted and applied so as to force the shutdown of any emission source making reasonable efforts to comply with applicable regulations prior to the mandatory deadlines for meeting the national primary ambient air quality standards. This is in accord with the general rule of statutory construction, long followed by this Court, that a statute susceptible of different meanings will be interpreted to avoid hardships. See *Burnet v. Guggenheim*, 288 U.S. 280, 285 (1933).

15. *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 483 F.2d 690 (8th Cir. 1973), and *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 494 F.2d 519 (2nd Cir. 1974).

> "We can see value in permitting a state to impose strict emission limitations now, subject to individual exemptions if practicability warrants; otherwise it may be forced to adopt less stringent limitations in order to accommodate those who, notwithstanding reasonable efforts, are as yet unable to comply." *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 478 F.2d 875, 887 (1973).

Most of the companies supporting this brief have variances from December 31, 1973 compliance date regulations until mid-1975. These companies would probably have been forced to suspend part of their operations or would have been fined in amounts up to $50,000 per day if § 1857c-5(f) were the only deferral mechanism and the compliance dates in the Texas Regulations remained unchanged. By way of illustration, the particular situation facing one of the companies supporting this brief, Exxon, is set forth in Appendix B which includes an excerpt from Exxon's testimony presented at its variance hearing on May 4, 1973. If § 1857c-5(f) were the sole deferral mechanism, it is unlikely that Exxon could have obtained any or adequate relief to develop and install wet gas scrubbing for its fluid catalytic cracking units as more than one year was required and technology, electrostatic precipitators, was available. Thus, Exxon would have been precluded from its efforts to develop and install new and improved technology, which is contrary to the policy of the Clean Air Act to "force" technology. See *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 489 F.2d 390, 401 (5th Cir. 1974).

In summary, EPA's approach allows the State to fulfill their "primary role" under the Clean Air Act in an active and beneficial manner. On the other hand, if the EPA had adopted the Fifth Circuit's interpretation, the States

would have been deterred from seeking the earliest possible improvement in our air resources as the more stringent § 1857c-5(f) postponement procedure would have forced the States to wait until almost all emission sources had achieved the desired emission levels before any enforcement could be commenced. This effect would be directly opposite to the Congressional mandate that the primary ambient standards be achieved "as expeditiously as possible" and would also be contrary to the obvious flexibility Congress desired to give to the States in developing their own implementation plans for achieving the ambient standards. As noted by the First Circuit, § 1857c-5(f) imposes a stricter standard than is suggested by the "as expeditiously as practicable" language of § 1857c-5(a)(2)(A)(i). *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 478 F.2d at 887.

II.

Reliance on EPA's Interpretation of The Clean Air Act and The Adverse Impacts If that Interpretation is Not Upheld

A. Reliance by The States and Industry

As previously noted, the EPA set forth its interpretation of the § 1857c-5(f) postponement provision and its policy on the granting of variances in its regulations for the "Preparation, Adoption and Submittal of Implementation Plans." See 40 C.F.R. § 51.32(f) (1973) quoted on page 5 herein. Relying upon these regulations the States of Georgia, Alabama, Mississippi, Louisiana and Texas developed implementation plans with early compliance dates and issued over 3,000 variances.[16] Companies ob-

16. See pages 6 and 8 and footnote 6 of the EPA's Petition for a Writ of Certiorari.

taining variances have relied on the State plans and regulations as well as the variances issued by the State air pollution control agencies in the conduct of their business. However, if the EPA had interpreted that Act in the manner the Fifth Circuit did and the States had kept the same compliance dates for their emission source regulations, one or more companies would have undoubtedly challenged the unreasonableness of the compliance dates or the lack of any procedure for the granting of variances from these dates in view of the limited relief under § 1857c-5(f).

Therefore, in view of the great reliance upon the EPA's interpretation of the Clean Air Act as set forth in its regulations for preparation of implementation plans, this interpretation should be upheld. This Court has indicated that general reliance upon an administrative agency's interpretation of a statute should be given strong consideration in determining the proper interpretation. *Udall v. Tallman*, 380 U.S. 1, 18 (1965); *McLaren v. Fleischer*, 256 U.S. 477, 480-481 (1921).

B. Administrative Chaos

If the Fifth Circuit's decision that the § 1857c-5(f) postponement procedure is the exclusive method for deferring emission source regulations is upheld, an administrative nightmare will be created by the invalidation of over 3,000 variances in just the States comprising the Fifth Circuit. For those sources with outstanding variances at the time of a decision, requests for one-year postponements under § 1857c-5(f) would have to be promptly processed to preclude enforcement via a citizen suit, as a request for a postponement does not stay the applicability of the emission source regulation. See 40 C.F.R. § 51.32(e) (1973).

In view of the adjudicatory hearing requirement as well as the specific requirements that must be considered in granting a postponement, the hearings will be very time consuming and it is unlikely that the staffs of the EPA and the State air pollution control agencies can adequately handle any more than a few § 1857c-5(f) requests within a short time.[17] Moreover, the adjudicatory hearings required under § 1857c-5(f) would be in many respects duplicative of previous variance hearings required by EPA procedures under 40 C.F.R. § 51.6(f) (1973).

C. Impact on Industry

Even more serious than the administrative difficulties resulting from the affirmance of the Fifth Circuit's decision would be the problems facing industry. Those companies operating under variances would be immediately subject to enforcement action under the Clean Air Act. Even if the EPA in its discretion would not take legal action against those companies having variances, there is still the concern of citizen suits under 42 U.S.C. § 1857h-2. In fact, most of the companies supporting this brief were served with a notice of a citizen suit in March of 1973,[18] asserting that the variances issued to the companies are invalid under the Fifth Circuit's decision and that their emissions into the atmosphere are unlawful. Presumably, a suit has not been filed in view of this Court's stay of the decision of the Fifth Circuit. However, if the Fifth Circuit's decision is upheld, a citizen suit could be filed

17. The States presumably could revise the regulations incorporated in their implementation plans but this is also a very time-consuming process which probably cannot be accomplished prior to the mandatory deadlines for meeting primary ambient standards in mid-1975.

18. This citizen suit notice is found in Appendix A.

immediately seeking to enjoin allegedly unlawful discharges of pollutants into the atmosphere. In addition, if this decision has a retroactive effect,[19] a suit could force the EPA Administrator to take enforcement action against these companies for fines of up to $50,000 per day per violation. 42 U.S.C. § 1857c-8.

Suits for injunctive action would have the most serious impact as all or part of a company's operation could be shutdown until applicable emission limitations are met. This could have a disastrous impact on the company, its customers and the area economy. Such a situation could result even if § 1857c-5(f) hearings are requested since, as indicated above, such hearings may not be able to be concluded promptly. Moreover, some companies may not be able to meet the stringent requirements of § 1857c-5(f) and thus would be at the mercy of regulatory agency or citizen enforcement action. This could occur in situations where technology is available but notwithstanding all reasonable efforts the necessary equipment or material cannot be obtained in time to meet the compliance date requirements.

As an illustration of the impact on one particular facility, reference is made to Appendix C which includes a portion of the testimony submitted by the Exxon Corporation with respect to their variance hearing before the Texas Air Control Board on May 4, 1973. In an effort to control particulate and sulfur oxide emissions from fluid catalytic cracking units at its Baytown, Texas refinery, Exxon developed new technology, wet gas scrubbing, to reduce emissions even further than that which would

19. Even if the Fifth Circuit's decision is upheld, the great reliance on the EPA's interpretation of the Act should result in the decision having only a prospective effect.

be accomplished with existing technology, electrostatic precipitators.[20] A variance was obtained from the Texas Air Control Board on July 26, 1973 to allow Exxon time to develop and install this new wet gas scrubbing system on its fluid catalytic cracking units.

If it is held that variances cannot be issued by the States, then one fluid catalytic cracking unit at Exxon's Baytown refinery is subject to injunctive action for violation of sulfur oxide emission regulations. As indicated at page C-2 of Appendix C, the shutdown of this unit would reduce gasoline production by 3,800,000 gallons per day, which is 49% of the total capacity of the refinery, one of the largest in the country. Heating oil production would be reduced by 1,800,000 gallons per day, which is 66% of the refinery capacity, and production of other fuel products will be reduced by 340,000 gallons per day. Thus, an injunction shutting down this one unit at Exxon's refinery would have a substantial impact not only on Exxon but on the overall energy situation in this country.[21]

Thus, a decision resulting in the invalidation of all variances could possibly have almost disastrous consequences on the economy and the energy situation. The administrative chaos that would result if such a decision were rendered would probably prevent the EPA from providing any timely and effective relief under § 1857c-5(f). This possibly disastrous situation has resulted from the reliance of the States and affected companies on the EPA's interpretation of the Clean Air Act. Accordingly, EPA's reasonable construction of the Act should be upheld.

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20. See Appendix B for a discussion of the problem confronting Exxon.

21. A similar situation exists at Exxon's Bayway, New Jersey refinery.

III.

The NRDC is Estopped to Challenge The EPA's Approval of Implementation Plans Permitting the Issuance of Variances

The EPA's interpretation of the Clean Air Act with respect to the extension of compliance dates for emission sources is set forth at 40 C.F.R. § 51.32(f), which has been previously quoted herein at page 5.[22] This regulation was originally promulgated by the EPA Administrator on August 14, 1971 at 36 Fed. Reg. 15494 as 42 C.F.R. § 420.32(f).[23] As previously indicated, this regulation and others were promulgated for the purpose of aiding the States in their preparation and development of implementation plans and were relied upon by the State of Georgia and other States with respect to the implementation plans prepared and submitted to the EPA Administrator by January 31, 1972.[24]

This suit originated in June of 1972 by the NRDC's filing of a Petition for Review challenging the EPA Administrator's approval of the State of Georgia's implementation plan on May 31, 1972.[25] The EPA Administrator's approval of the Georgia plan reflects no more than the application of his interpretation of the Clean Air Act requirements set forth in his regulations on the requirements for the preparation on such plans published in the August 14, 1971 Federal Register.[26] However, by the time the

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22. Footnote 31 of the Fifth Circuit's opinion identifies this section as stating EPA's "basic position." 489 F.2d at 401.

23. This regulation was eventually recodified as 40 C.F.R. § 51.32 (f) on November 25, 1971 at 36 Fed. Reg. 22405.

24. See 37 Fed. Reg. 10842 *et seq.*, May 31, 1972.

25. See 37 Fed. Reg. 10859, promulgating 40 C.F.R. §§ 52.572-4. A few provisions of the plan were disapproved.

26. See 40 C.F.R. § 52.02(a) as found at 37 Fed. Reg. 10846, May 31, 1972.

NRDC filed its Petition for Review, there had been substantial reliance by the States as well as industry upon the EPA's interpretation of the Act concerning variances and § 1857c-5(f) postponements. Moreover, the Administrator's action on the plans of many States, including Texas, as set forth at 37 Fed. Reg. 10842 *et seq.*, May 31, 1972, were not challenged by the NRDC or any other party. Consequently, even greater reliance was placed by these States and the emission sources obtaining variances from these States on the EPA's interpretation of the Act.

Although the judicial review provision of the Clean Air Act, 42 U.S.C. 1857h-5(b), does not specifically relate to the EPA regulations promulgated on August 14, 1971, it is submitted that the NRDC is nevertheless estopped to challenge these regulations or their application in view of the substantial reliance on the regulations prior to the challenge. Because of this reliance by the States and industry, the overruling of the EPA's interpretation of the Act will result, as set forth in the previous section, in administrative chaos and possible severe and disastrous consequences to industry and the nation as a whole. If the NRDC had challenged the August 14, 1971 regulations promptly after their promulgation under the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701-706,[27] the EPA could have taken steps to preclude any substantial reliance on the regulations by the States in the development of their implementation plans.

27. That Congress recognized the problems which would be caused by delayed challenges to actions under the Clean Air Act is witnessed by the 30-day limitation for filing Petitions for Review of the Administrator's actions. 42 U.S.C. § 1857h-2(b). It is submitted that this judicial review provision provides a guide in determining what is reasonably prompt action in challenging an action of the EPA Administrator.

This Court has recognized that a party is estopped on the grounds of laches where there is unreasonable delay in enforcing a right coupled with disadvantages to other parties. *Hays v. Port of Seattle*, 251 U.S. 233, 239 (1920); *Penn Mutual Life Insurance Co. v. City of Austin*, 168 U.S. 685, 696-701 (1898); *Triangle Improvement Council v. Ritchie*, 314 F.Supp. 20 (S.D.W.Va. 1969), aff'd 429 F.2d 423 (4th Cir. 1970), cert. den., 402 U.S. 497 (1971). Clearly the facts of this case call for the application of the doctrine of laches against the NRDC in their challenge to the EPA's interpretation of the Clean Air Act with respect to variances and § 1857c-5(f) postponements as set forth in the August 14, 1971 regulations.

CONCLUSION

It is submitted that the EPA's interpretation of the Clean Air Act concerning the granting of variances from State implementation plans should be upheld and that the decision of the Fifth Circuit Court of Appeals holding § 1857c-5(f) to be the exclusive deferral mechanism should be reversed.

Respectfully submitted,

R. GORDON GOOCH
Baker & Botts
1701 Pennsylvania Ave., N.W.
Washington, D. C. 20006

LARRY B. FELDCAMP
Baker & Botts
3000 One Shell Plaza
Houston, Texas 77002

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief Amicus Curiae have been personally delivered this 22nd day of November, 1974, to the Solicitor General, counsel for Train et al., and Thomas B. Stoel, Jr. and Richard E. Ayres, counsel for National Resources Defense Council, Inc.

APPENDIX A

NOTICE

That

SHARON E. GORMAN
#4 BAY VILLA
BAYTOWN, TEXAS 77520

and other persons, citizens of the United States of America and State of Texas, pursuant to subsection 304(b) of the Clean Air Act (Sec. 12, Public Law 91-604; 84 Stat. 1706, 42 U.S.C. §§ 1857 et seq) and 40 C.F.R. 54; 36 F.R. 23386, December 9, 1971, hereby give notice as a prerequisite to the commencement of a civil action to enforce the law and will show in the appropriate United States Courts as follows:

I.

That, the Administrator of the Environmental Protection Agency approved the State of Texas's plan for achieving the federal ambient air quality standards under the Clean Air Act Amendments of 1970. And that said plan allows Texas officials to grant variances from particular requirements of the plan. And that the plan directs Texas officials to take into account economic impact and technological feasibility in the discharge of their duties under the Texas Clean Air Act (Article 4477-5, sec. 3.13 VACS).

II.

That, the Texas Air Control Board has granted variances from the particular requirements of the Texas Clean

Air Act and rules, regulations and orders of said Board. That said variances are contrary to the requirements of the implementation plan prescribed by the Federal Clean Air Act.

III.

That certain corporations doing business in the State of Texas [the names of which are attached hereto as appendix A] from and after January 1, 1974, and each and every day thereafter have emitted and continue to emit air contaminants into the atmosphere so as to violate the emission standards and limitations required by the Texas Clean Air Act and Rules and Regulations adopted by the Texas Air Control Board, under variances issued by the Texas Air Control Board. And that said emissions into the atmosphere are unlawful.

IV.

That under the case of the *Natural Resources Defense Council v. Environmental Protection Agency,* Civil No. 72-2402 (5th Cir., Feb. 8, 1974), the conduct of the Administrator, Texas Air Control Board, and above mentioned corporations is clearly illegal.

Respectfully,

/s/ J. R. Needham

J. RAYMOND NEEDHAM
Old Cotton Exchange Building
202 Travis
Houston, Texas 77002
Attorney for Sharon E. Gorman

Alcoa (Aluminum Company of America)
American Petrofina Company
ASARCO (American Smelting & Refining Company)
Celanese Corporation
Champlin Petroleum Company
Exxon Company U.S.A.
Gulf Oil Company U.S.
Mobil Chemical Company
Phillips Petroleum Company
Rio Grande Sugar Growers
Texaco Incorporated
Texas Eastern Transmission Corporation
Union Carbide Corporation
Union Oil Company of California

APPENDIX B

TEXAS AIR CONTROL BOARD
PUBLIC HEARING

IN THE MATTER OF

EXXON COMPANY, U. S. A.

Houston, Texas

May 4, 1973

HEARINGS EXAMINER: Gerald R. Severson

STAFF MEMBERS PRESENT:

Tom Buckle
Tommy Ray
Sabino Gomez

* * *

(Mr. Johnson speaking from p. 14-17
of Hearing Transcript)

Mr. Johnson: * * *

. . . As the Texas regulations on particulate emissions were finalized in early 1972, it appeared that electrostatic precipitators, which I will refer to as ESP's probably from here on, it appeared that ESP's would be marginal in their ability to meet the Texas regulations on our two cat units, marginal meaning that it was not clear if ESP's could or could not meet the regulations. The primary reason for this is that the Texas regulations include so-called condensable particulates in the definition of the regulated particulate emissions. These condensable particulates, which are

primarily sulfates, exist in a gaseous form in the cat unit flue gas and are not removed by ESP's. We have some Vu-Graphs which I hope some of it you can see. Can you all see? Vu-Graph 1 shows the effect of condensable particulates using cat unit No. 2 as an example. The flue gas coming out of the carbon monoxide furnaces contains about 480 pounds per hour of catalyst fines and 85 to 100 pounds per hour of condensable particulates, for a total particulate emission rate of 565 to 580 pounds per hour. ESP's can remove about 92 percent of the catalyst fines but none of the condensables. Therefore the emissions after installation of ESP's would be about 40 pounds an hour of catalyst fines and 85 to 100 pounds an hour of condensables, for a particulate emission of 125 to 140 pounds per hour for an overall removal efficiency of 76 to 78 percent. The emission limit for cat unit No. 2, determined from Rule 105.1, is 140 pounds per hour, which means that ESP's would be marginal in meeting the Texas regulations on this particular unit. We determined that ESP's would also be marginal at our cat unit No. 3. The New Jersey regulations also include condensables in the regulated particulate emission, and Exxon's engineering staff at the Bayway, New Jersey refinery determined that ESP's could not meet the New Jersey regulations. Because of the inability of ESP's and other conventional technology to meet the New Jersey regulations and the fact that these technologies were marginal in Texas and in our desire to do a better job, our company in early 1972 began intensive engineering work to find a method for reducing cat unit particulate emissions that would meet the regulations. The problem with condensable particulates suggested the possibility of wet scrubbing, but we found that the wet scrubbing process had not been developed for use in cat unit service—or, to the best of our knowledge, even pilot

tested in this service. Therefore, we undertook laboratory and then pilot-scale wet gas scrubbing research and development, looking at several scrubber systems. Based on our studies of three different pilot plant installations and our engineering evaluation of other technologies, we have concluded that wet scrubbing is potentially the best method for control of cat unit emissions. Comparing our wet scrubbing research and development data with the more conventional means of cat unit emission control, namely ESP's, we have found that wet scrubbing is potentially a better process for several reasons. First, wet scrubbing is more efficient that ESP's for dry solids removal. Second, wet scrubbing removes condensable particulates while ESP's do not. Third, wet scrubbing removes sulfur dioxide while ESP's do not. Fourth, it is potentially more reliable than ESP's. The second Vu-Graph illustrates these wet scrubbing advantages, using the predicted performance of cat unit No. 2 as an example. At the top of the Vu-Graph, we have again shown the predicted particulate removal efficiencies using ESP's. Also shown are the approximate SO_2 emissions from our CO furnaces. Note that ESP's do not remove SO_2. At the bottom of the Vu-Graph is the predicted performance of wet gas scrubbing, which we have abbreviated WGS. Catalyst removal efficiencies are in the range of 92 to 97 percent; condensable removal efficiencies, 70 to 90 percent, for an overall removal efficiency of 88 to 96 percent. Total particulate emissions are expected to be 25 to 70 pounds per hours, compared with 125 to 140 for ESP's. Also note that SO_2 removal efficiencies are in the range of 90 to 95 percent. * * *

APPENDIX C

Exxon Company, U.S.A.
Post Office Box 3950
Baytown, Texas 77520

Refining Department
Baytown Refinery

E. T. Di Corcia
Manager

May 10, 1973

Additional Testimony
Texas Air Control Board
Hearing On Compliance Status
File: M.73 10-9-3(8)

Mr. Jerry Severson, Hearing Examiner
Texas Air Control Board
820 East 53rd Street
Austin, Texas 78751

Dear Mr. Severson:

In order to supplement the information we presented at the May 4, 1973, Texas Air Control Board public hearing on the compliance status of Exxon Company, U.S.A. with respect to Regulations I and V, we are enclosing additional testimony to be submitted into the hearing record.

This information has been notarized as is required for submission into the hearing record.

If you have questions concerning this statement, please contact Mr. J. M. Johnson at Area Code 713, 427-5711, Extension 3159.

Very truly yours,
/s/ E. T. Di Corcia

:jaa

A Division of Exxon Corporation

ADDITIONAL TESTIMONY—TEXAS AIR CONTROL BOARD HEARING ON COMPLIANCE STATUS

* * *

Economic Impact of Shutting Down FCCUs

We considered two cases in making the evaluation—shutting down both FCCUs during January 1974 and shutting down FCCU No. 3 from February 1974 to August 1975.

Shutting down both FCCU No. 3 and FCCU No. 2 during January 1974 would shut down most of the Refinery. Assuming that we would not lay off our 2,000 employees during this period, the economic loss would be $8,500,000. Gasoline production would be reduced by 6,900,000 gallons/day or 89 percent of refinery capacity. Heating oil production would drop 2,200,000 gallons/day (83 percent of capacity). Other fuel products would drop by 670,000 gallons per day.

The effect of shutting down FCCU No. 3 alone from February 1974 until August 1975, when wet gas scrubbing should be in operation, is also drastic. The total economic loss for this time period would be $80,000,000. Gasoline production would be reduced by 3,800,000 gallons per day (49 percent of total capacity); heating oil would be reduced by 1,800,000 gallons per day (66 percent of capacity); and other fuel products would be reduced by 340,000 gallons per day.

* * *